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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DYMOS MARKS, Plaintiff and Appellant, v. CROSSROADS CARRIERS, LLC, Defendant and Respondent.	D071183 (Super. Ct. No. 37-2014-00021967-CU-WT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joan M. Lewis, Judge. Affirmed.

Dymos Marks, in pro. per., for Plaintiff and Appellant.

Dunn, DeSantis, Walt & Kendrick and David D. Cardone for Defendant and Respondent.

I

INTRODUCTION

Dymos Marks appeals from a judgment dismissing his complaint as a sanction for his repeated failures to appear for his deposition and a related independent medical examination. Marks filed his complaint for wrongful termination against his former employer, Crossroads Carriers, LLC (Crossroads). After his counsel withdrew, Marks effectively abandoned the case and refused to be deposed. Marks ignored multiple warnings and an order from the trial court to appear for his deposition, leading to the court's order granting Crossroads's motion to dismiss the lawsuit. On appeal, Marks appears to contend his failure to attend depositions is excusable and the dismissal order should be reversed. Our review of the limited record provided does not reveal any abuse of discretion by the trial court. We, therefore, affirm the judgment.

II

BACKGROUND

Based on the extremely limited record supplied by Marks and augmented by Crossroads, it appears Marks filed a complaint alleging Crossroads wrongfully terminated him from his employment as a truck driver. In his operative complaint, Marks alleged Crossroads's actions caused him to suffer "humiliation, emotional distress, mental anguish, physical anguish, and physical pain." At the time he filed his complaint, Marks was represented by counsel.

Crossroads first attempted to depose Marks on November 24, 2015. Marks's counsel attended the deposition, but Marks did not appear. Crossroads sent a second deposition notice for December 1, 2015, but Marks, through counsel, refused to appear.

On December 4, 2015, the court granted Marks's counsel's motion to be relieved as counsel. At that hearing, the court warned Marks that he must appear for his deposition or risk sanctions. Marks did not retain a new attorney and proceeded in propria persona.

Defense counsel then noticed a deposition for December 17, 2015. Again, Marks failed to appear. Crossroads filed an ex parte application for an order to show cause regarding sanctions for Marks's failure to appear. The court issued the order to show cause, but ultimately declined to issue sanctions. Marks appeared telephonically for the hearing and asserted he needed two weeks' notice before any deposition. He also assured the court he would attend an independent medical examination scheduled for the following week. The court warned Marks that his failure to attend may result in the dismissal of his lawsuit.

Marks did not attend the independent medical examination. He arrived for the examination, but left after eight minutes when he claimed to be suffering a medical emergency.

Following another ex parte application by Crossroads, Marks appeared before the court and agreed to sign a stipulation to dismiss his claims of emotional distress to avoid having to attend an independent medical examination. Later, however, he refused to sign the stipulation prepared by defense counsel. At another hearing, Marks agreed on the

record to dismiss his emotional distress claims. At the same hearing, the court ordered Marks to appear for a deposition on March 25, 2016.

On the date scheduled for his deposition, Marks appeared at defense counsel's office and then abruptly disappeared. He later called to explain he would not return and offered no explanation for his disappearance.

Crossroads moved for terminating sanctions based on Marks's repeated failure to participate in discovery. The motion also sought monetary sanctions for the costs incurred in preparing for the depositions and independent medical examination. Marks did not file a timely opposition to the motion. On the afternoon before the scheduled hearing, Marks filed a belated "response to memorandum of points and authorities." The handwritten response, which was not verified, asserted a number of claims against both defense counsel and Marks's former attorney and argued that his failure to appear at each deposition was excusable.[1]

The court granted Crossroads's request for terminating sanctions. The court explained it reviewed the history of the case and found terminating sanctions were appropriate due to "the repeated failures by the Plaintiff to participate in discovery and, importantly, the violation of this Court's order." The court further explained that because it imposed "the most severe sanction available," it was declining to also award monetary sanctions. Marks now appeals from the order dismissing his complaint.

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1 Although the record is not clear, Crossroads represents that the court did not consider Marks's untimely response.

III

DISCUSSION

A

As a preliminary matter, Crossroads filed a motion to dismiss the appeal premised on Marks's failure to provide an adequate record on appeal for meaningful review. The clerk's transcript on appeal includes only three declarations filed by Marks, his untimely response to Crossroads's motion for terminating sanctions, the order granting the motion and dismissing the complaint and subsequent notice of entry of the order, and later filings related to the appeal and preparation of the record. Because none of the hearings were reported, there is no reporter's transcript.

As Crossroads correctly asserts, a fundamental rule of appellate review is that a judgment of the trial court is presumed to be correct. (*Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 956.) To overcome this presumption, the appellant carries the burden of providing this court with an adequate record to affirmatively demonstrate prejudicial error by the trial court. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187.) Accordingly, an appellant's failure to provide an adequate record makes it impossible to overcome the presumption of correctness necessary to secure a reversal of the trial court's order or judgment.

However, as the cases cited by Crossroads suggest, appellate courts do not generally *dismiss* an appeal due to the appellant's failure to provide an adequate record, but rather affirm the trial court's decision. (See, e.g., *Foust v. San Jose Construction Co., Inc., supra,* 198 Cal.App.4th at p. 190; *In re Marriage of Wilcox* (2004) 124 Cal.App.4th

492, 498 [declining to dismiss appeal on the basis of an inadequate record]; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 [failure to provide adequate record "requires that the issue be resolved against plaintiff"].)

Moreover, before Crossroads filed its respondent's brief, we granted its motion to augment the record. Thus, in its current form, the record on appeal is now sufficient to allow this court to review the trial court's order. For these reasons, we deny Crossroads's motion to dismiss the appeal.[2]

B

In his opening brief, Marks seeks the reversal of the order dismissing his action as a sanction for repeatedly failing to attend his deposition and scheduled independent medical examination.

"California discovery law authorizes a range of penalties for a party's refusal to obey a discovery order, including monetary sanctions, evidentiary sanctions, issue

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2 Crossroads's motion to dismiss also asks this court to strike a page from the clerk's transcript. The document in question is a Judicial Council form entitled "Request for Accommodations by Persons with Disabilities," partially filled out by Marks. Crossroads contends the form was never filed in the superior court and, therefore, is not part of the trial court record. The document in question, however, appears to have been attached to Marks's untimely (but nevertheless filed) response to the motion for terminating sanctions. In that sense, it was filed in the superior court and we decline to strike the document from the clerk's transcript. We do note, however, that Marks did not formally file the request for accommodations in the superior court. Instead, it appears Marks was attempting to use the form intended to be filed with the superior court to ask *defense counsel* to provide accommodations in counsel's office for purposes of Marks's deposition. This is an improper use of the form and there is no indication it was presented to defense counsel before Marks failed to appear for his deposition. Thus, it is properly a part of the record on appeal, but irrelevant to our analysis.

sanctions, and terminating sanctions. ([Code Civ. Proc.,] §§ 2023.010, 2023.030; *Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390; *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 991 (*Doppes*).) A court has broad discretion in selecting the appropriate penalty, and we must uphold the court's determination absent an abuse of discretion. (*Los Defensores, supra,* at p. 390.) We defer to the court's credibility decisions and draw all reasonable inferences in support of the court's ruling. (*Id.* at pp. 390–391.)" (*Lopez v. Watchtower Bible and Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604 (*Lopez*).)

The trial court's broad discretion must be tempered with the need to protect a litigant's due process right to a trial on the merits. Thus, "the terminating sanction is a drastic penalty and should be used sparingly." (*Lopez, supra,* 246 Cal.App.4th at p. 604.) Absent extreme circumstances, the court should first attempt less severe alternatives and only issue a terminating sanction once it finds those alternatives to be ineffective. (*Ibid.*)

In *Miranda v. 21st Century Insurance Company* (2004) 117 Cal.App.4th 913 (*Miranda*), the appellate court affirmed the trial court's issuance of terminating sanctions even in the absence of earlier, lesser sanctions. In *Miranda*, the plaintiff refused to authorize her medical providers to release records from her treatment related to her proceeding against her insurance carrier. (*Id.* at pp. 917-918.) After defendant's informal attempts to secure plaintiff's authorization failed, the trial court ordered plaintiff to authorize the release of her medical records. (*Id.* at p. 919.) Despite the court order, plaintiff continued to refuse to authorize the release. (*Ibid.*) Upon the request of defendant, the trial court then issued a terminating sanction of dismissal. (*Ibid.*)

On appeal, the *Miranda* court held the trial court did not abuse its discretion. The appellate court focused on the plaintiff's disobedience of a court order, which alone warranted dismissal of the action. (*Miranda*, *supra*, 117 Cal.App.4th at pp. 928-929.) The court also noted it did not appear lesser sanctions would have sufficed. (*Id.* at p. 929.) As the court explained, "[m]onetary sanctions would not have provided defendant the information to which it was entitled. An evidence sanction is not effective where the party withholding the evidence is not the party who wishes to use it. And the only issue sanction we can envision under these circumstances would be an order establishing that plaintiff's injury was not caused by the accident, a result equivalent to a dismissal of plaintiff's claim." (*Ibid.*)

Marks's conduct mirrors the conduct of the plaintiff in *Miranda*. Before seeking relief in court, Crossroads attempted to take Marks's deposition on three different dates and Marks failed to appear each time. Although Crossroads then sought sanctions, the court initially declined to sanction Marks and only warned him to attend his deposition and the scheduled independent medical examination. Marks did not heed this warning and subsequently left a physician's office before the medical examination could begin. After the court ordered Marks to appear for his deposition, Marks again tentatively appeared at the right location but abruptly left without explanation before the deposition could begin.

Given Marks's physical presence at the locations for his medical examination and deposition, there is no doubt he was aware of his obligations. Despite this awareness, and in direct disobedience of a court order, Marks refused to be deposed. The trial court

properly considered Marks's repeated failures to attend his deposition and dismissed the action. (See, e.g., *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1106 [trial court may properly consider past discovery misconduct when determining proper sanction following latest transgression].)

It also does not appear lesser sanctions would have compelled Marks's participation. Monetary sanctions would not have provided Crossroads the information to which it was entitled. An evidence sanction is not effective where the party withholding the evidence is not the party who wishes to use it. And the only issue sanction we can envision under these circumstances would be an order precluding Marks from testifying at trial, a result equivalent to a dismissal of his claim.

On appeal, Marks generally contends his repeated failure to attend his deposition was excusable. This claim, however, is entirely conclusory and unsubstantiated. The Code of Civil Procedure provides multiple methods for a party to avoid overly burdensome discovery requests. If Marks had a valid reason to not attend his deposition or independent medical examination, he could have requested the protections provided in the discovery statutes. His failure to do so precludes his attempts on appeal to avoid the consequences of his willful disobedience of a court order.

Discovery sanction orders "are 'subject to reversal only for arbitrary, capricious or whimsical action.' " (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.*, *supra*, 163 Cal.App.4th at p. 1102.) The trial court acted appropriately within its discretion when it issued terminating sanctions due to Marks's repeated failures to participate in the

discovery process in his own lawsuit and, most importantly, his disobedience with an order of the trial court.

IV

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

HUFFMAN, J.